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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. LOUIS GREGO, Defendant and Appellant.	H021870 (Santa Clara County Super.Ct.No. C9812314)

I. Statement of the Case

Defendant Louis Joseph Grego appeals from a judgment entered after a jury convicted him of transporting marijuana.[1] He claims he was immune from prosecution for this offense and therefore his conviction violates his right to due process. He also claims the trial court erred in failing to instruct the jury on his affirmative defense.

We affirm the judgment.

II. Facts

Officer Dean Ackemann of the San Jose Police Department testified that on December 16, 1998, he and his partner Officer Tom Sims went to defendant's residence and spoke to him privately about information they had that he was selling marijuana.

[1] The jury acquitted defendant of possession for sale of marijuana.

Defendant denied it but gave Ackemann permission to search his room. Ackemann found a marijuana pipe.

After further questioning, defendant admitted that he and some friends had pooled their money and bought five pounds of high-grade marijuana, some of which they planned to sell to subsidize their own use. Defendant said he still had one pound, which he kept at a friend's house. Ackemann asked defendant to take him there to get it. Defendant refused because he did not want his friend to be arrested. Ackemann assured him that because he was taking responsibility, his friend would not be arrested. Ackemann further explained that if they retrieved it, defendant would not be arrested at that time. Instead, Ackemann would submit a report to the District Attorney, who would decide whether to prosecute. Defendant said he would only get the marijuana by himself. Ackemann warned him against doing so. Ackemann testified that he told defendant "that by me going with him, he's not going to get in any trouble going to the location. But going by himself, if another police officer stops him, he's subject to being arrested on the spot."

While Ackemann was still there, defendant spoke to his friend and then told Ackemann that he was going to get the marijuana. Ackemann again offered to go with him, and when defendant refused, Ackemann said, " 'Okay. Go and get the marijuana.' "

Defendant returned 45 minutes later with a bag containing only two ounces of marijuana and a gram scale. Ackemann suspected that defendant might not bring all of it back, and when he looked in the bag it did not contain a pound, as defendant had previously reported. Ackemann asked defendant what had happened to the rest, and defendant said his friend had sold it. He did not identify his friend. Ackemann then repeated what he had said about writing a report to the District Attorney.

On cross-examination, Ackemann admitted that he asked defendant to retrieve the marijuana. His primary motivation was to get the drugs off the street. He noted, however, that he did not ask to go get it by himself. Rather, his specific request was to

go with defendant to get it, but defendant refused. Ackemann explained, "[Defendant] refused to take me with him. His suggestion and compromise that he go gets the marijuana—he's going to go get the marijuana. I explained to him if he goes and gets the marijuana, he's subject to arrest if he gets stopped by another officer." Ackemann further stated that after defendant said he was going to go by himself, he said " 'Go get the marijuana' " or words to that effect with the proviso that he could be arrested for doing so if he was stopped by the police. He did not want defendant to go by himself and was trying to convince him not to do so. However, when this effort failed, Ackemann felt that his only option was to let defendant do what he wanted to do even though Ackemann knew it was illegal. Ackemann emphasized that he told defendant that "if he brought back marijuana to me he was not going to be arrested just because he bought [*sic*] back marijuana." Ackemann said he told defendant, " 'I'm here to take your marijuana, write my report. I'm not going to arrest you for doing what you are doing right now, but I'm going to write a report, forward it to [the] District Attorney's Office who will file charges .' . . . " Ackemann agreed that, in effect, he told defendant that " 'if you go and get pot and bring it back to me, I will be able to arrest you when you come back with that pot but I won't do that' . . . .' "

The Defense

Defendant's father testified that he stood outside defendant's bedroom window and overheard Ackemann say he had enough evidence to put defendant in jail and confiscate his vehicle. Ackemann then threatened to do so if defendant did not cooperate. Defendant's father did not hear defendant admit that he sold drugs or was even involved with drugs.

III. Immunity from Prosecution

Defendant contends that his conviction must be reversed because under Health and Safety Code section 11367, he was immune from prosecution. We disagree.

Health and Safety Code section 11367 provides, "All duly authorized peace officers, while investigating violations of this division in performance of their official duties, *and any person working under their immediate direction, supervision or instruction*, are immune from prosecution under this division." (Italics added.)

Defendant claims that Ackemann made him an agent for the purpose of getting marijuana off the streets, and defendant, acting on behalf of and under the direction of Ackemann, retrieved his stash of marijuana, transported it back home, and surrendered it to Ackemann. Accordingly, he argues that he was immune from prosecution.

The People note that defendant failed to raise the affirmative defense of immunity below and therefore waived it. We agree. It is settled that the failure to raise an affirmative defense, such as double jeopardy, in the trial court is treated in the same way as a failure to challenge the legality of a search, the peremptory strikes of a prosecutor, the voluntariness of a confession, or prosecutorial misconduct: The failure to object or otherwise raise the issue generally forfeits the claim on appeal.[2] (See *People v. Williams* (1999) 21 Cal.4th 335, 343-344; *People v. Ferguson* (1982) 129 Cal.App.3d 1014, 1023 and cases cited there.)

Defendant argues that the evidence established as a matter of law that he was acting as Ackemann's agent in retrieving the marijuana and thus his claim of immunity presents only a question of law involving statutory interpretation: Did Health and Safety Code section 11367 immunize defendant from prosecution for transporting marijuana? We are not persuaded.

Here, the issue of immunity does not require an interpretation of the statute because its language is simple, clear, and unambiguous. Rather, the issue here is one of

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[2] Reviewing courts may, however, address the merits of the claim indirectly if the defendant contends that the failure to raise a claim in the trial court constituted ineffective assistance of counsel.

application, which here involves a mixed question of law and fact: What did Ackemann do and say to defendant; and what did defendant think, say, and do in response?

Defendant did not testify concerning what Ackemann said, how he understood it, why he retrieved the marijuana, and whether he thought that he was a police agent, like, for example, an informant or a person involved in a staged drug transaction. Moreover, defendant's father's testimony did not suggest that defendant acted as an agent. On the contrary, his testimony supported defendant's entrapment defense. He said that Ackemann threatened defendant, suggesting that defendant acted under duress.[3]

Furthermore, standing alone, Ackemann's testimony does not establish as a matter of law that defendant was a police agent or that he was acting at Ackemann's direction when he went to get the marijuana by himself. Rather, it was defendant's idea to go by himself, and Ackemann tried to dissuade him and warned him that doing so was illegal and that he ran the risk of being arrested.

Under the circumstances, we conclude that defendant's failure to raise the issue of statutory immunity and develop a factual record to support it waived his claim on appeal.

Defendant's reliance on *In re Neely* (1993) 6 Cal.4th 901 is misplaced. In *Neely*, there was strong and compelling evidence of an agency relationship between a jail inmate and the police. In particular, police and the inmate had an understanding that if the inmate elicited incriminating information from the defendant, they would help the inmate secure leniency on the charges he faced. The police coached the inmate on how to elicit information and told him what information they wanted him to elicit. On these facts, the court found that the inmate was a police agent and was acting under the general direction of police when he engaged defendant in conversation and elicited incriminating

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[3] Defense counsel argued that the prosecution had failed to prove that doing what Ackemann told defendant to do—go get the marijuana—was unlawful. He stressed the instruction that possession of marijuana for the purpose of abandonment, disposal or destruction is not unlawful Counsel also argued entrapment.

information. Further distinguishing *Neely* from this case is the fact that there the issue was not whether the inmate was immune from prosecution, but whether the defendant's attorney rendered ineffective assistance in not moving to suppress the information elicited by the inmate. (*Id*. at pp. 916-920.)

In short, *Neely* is factually and legally distinguishable and does not support defendant's claim.

Defendant's claims that Ackemann's conduct was so outrageous—i.e., manipulating defendant's inclination to transport marijuana and subtly directing him to do so—that a conviction for transporting marijuana violated his right to due process of law. Defendant bases this claim on the view that "there is no controversy about the fact that the crime of transportation marijuana occurred because of the direction and instruction of Officer Ackemann." We disagree.

Ackemann did not tell defendant to retrieve the marijuana by himself; nor did he suggest that defendant do so. Rather, he warned defendant that he risked being arrested for doing so. That Ackemann did not prevent defendant from retrieving the marijuana by himself is not, in our view, the sort of outrageous police misconduct that violates due process.

Moreover, we do not find Ackemann's conduct here comparable to the overbearing police conduct in *People v. McIntire* (1979) 23 Cal.3d 742 and *People v. Isaacson* (1978) 44 N.Y.2d 511. These cases do not reasonably suggest that Ackemann manufactured a crime, and thus defendant's reliance on them is misplaced.

IV. Failure to Instruct

Defendant contends the court erred in failing to instruct the jury on the mistake-of-fact defense. He asserts that "[a]lthough [he] offered entrapment as an affirmative defense, it is clear from the evidence that [he] believed that he had authority to go and retrieve the marijuana, and transport it back to the officer." In other words, there was

evidence that he reasonably, but mistakenly, believed he was acting with Ackemann's authority in retrieving the marijuana.

The trial court has a duty to instruct the jury sua sponte on affirmative defenses when it appears the defendant is relying on such a defense or when there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 157.)

The mistake-of-fact defense is based on Penal Code section 26, which provides, in pertinent part, that persons who "committed the act or made the omission charged under an ignorance or mistake of fact, which disproves a criminal intent," are not criminally liable for the act. "Put another way, people do not act unlawfully if they commit acts based on a *reasonable* and honest belief that certain facts and circumstances exist which, if true, would render the act lawful. [Citations.]" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396, italics added.)

Since defendant did not rely on the mistake-of-fact defense at trial, we first determine whether it was inconsistent with his entrapment defense. "In California, the test for entrapment focuses on the police conduct and is objective. Entrapment is established if the law enforcement conduct is likely to induce a *normally law-abiding person* to commit the offense. [Citation.] '[S]uch a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect—for example, a decoy program—is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.' [Citation.]" (*People v. Watson* (2000) 22 Cal.4th 220, 223, original italics.)

The testimony of defendant's father to the effect that Ackemann threatened to arrest defendant and confiscate his vehicle and that defendant did not admit any illegal

activity, would, if believed, support a finding that Ackemann was overbearing and induced defendant to commit an offense he would not otherwise have committed. Such a finding is not necessarily inconsistent with a finding that defendant acquiesced to Ackemann's threats reasonably, but mistakenly, believing that doing what Ackemann wanted was not illegal. Thus, we turn to whether there was substantial evidence to support an instruction on the additional defense. We conclude that there was not.

First, "[t]o determine whether a mistake of fact applies we must assume the facts were as the defendant perceived them." (*People v. Watkins* (1992) 2 Cal.App.4th 589, 594.) Here, as noted, defendant did not testify concerning what he thought or believed after talking to Ackemann. Moreover, given Ackemann's testimony, the mere fact that defendant retrieved the marijuana does not support an inference that he actually and reasonably thought he could do so with immunity from arrest and prosecution. On the contrary, Ackemann's undisputed testimony that he warned defendant against going by himself because he could be arrested for having and transporting the marijuana more reasonably implies that defendant did not believe he was immune and that he simply accepted the risk of transporting marijuana by himself to protect his friend. Moreover, Ackemann's testimony renders any potential belief in total immunity wholly unreasonable. Under the circumstances, we conclude that the evidence did not support instruction on the mistake-of-fact defense, and therefore the court did not err in failing to give one.

People v. Lucero (1988) 203 Cal.App.3d 1011, cited by defendant, is distinguishable because there was substantial, if not strong, evidence based on the defendant's prior dealing with the police to support a finding that he both actually and honestly believed that he was acting for the police when he committed the crime and thus lacked criminal intent in committing the illegal act.

V. Disposition

The judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Premo, Acting P.J.

Elia, J.